

**SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION,
SECOND JUDICIAL DEPARTMENT**

Wilmington Trust, N.A. v. Pape

2021 NY Slip Op 08278 (N.Y. Ct. App. 2021) · No. 2019-03717 · Decided March 17, 2021

SUMMARY

The Appellate Division, Second Department, reversed an order and judgment of foreclosure and sale involving 134 Eel Pot Alley, LLC. The court held that the defendant provided a reasonable excuse for its four-day delay in answering and demonstrated a potentially meritorious statute-of-limitations defense, warranting leave to interpose a late answer under CPLR 3012(d).

CASE DETAILS

COURT	Supreme Court of the State of New York, Appellate Division, Second Judicial Department
WRITING FOR THE COURT	Mark C. Dillon, J.P.; Sylvia O. Hinds-Radix, J.; Valerie Brathwaite Nelson, J.; Paul Wooten, J.
JURISDICTION	New York
DECIDED	March 17, 2021
DOCKET	2019-03717
DISPOSITION	reversed_and_remanded
PROCEDURAL POSTURE	Defendant 134 Eel Pot Alley, LLC, appealed from an order and judgment of foreclosure and sale that denied its motion for leave to interpose a late answer and granted the plaintiff's motion to confirm the referee's report and enter a judgment of foreclosure and sale.
STANDARD OF REVIEW	Abuse of discretion; the determination of what constitutes a reasonable excuse for a late answer lies within the sound discretion of the trial court.
PRECEDENTIAL VALUE	Published intermediate appellate decision
PARTIES	134 Eel Pot Alley, LLC v. Wilmington Trust, National Association

TOPICS

foreclosure

pleadings

statute of limitations

civil procedure

appellate procedure

PRACTICE AREAS

civil procedure

foreclosure

appellate procedure

QUESTIONS PRESENTED

1. Whether the defendant established a reasonable excuse and a potentially meritorious defense warranting leave to interpose a late answer under CPLR 3012(d).
2. Whether the order and judgment of foreclosure and sale should stand after the trial court denied leave to file the late answer.

HOLDINGS

1. A defendant seeking leave to file a late answer must provide a reasonable excuse for the delay and demonstrate a potentially meritorious defense. A credible explanation of law-office failure for a brief four-day delay, together with a potentially meritorious statute-of-limitations defense, lack of willfulness, lack of prejudice, and the public policy favoring resolution on the merits, warranted leave to file the late answer.

KEY QUOTATIONS

"[A] defendant who has failed to timely answer a complaint and who seeks leave to file a late answer must provide a reasonable excuse for the delay and demonstrate a potentially meritorious defense to the action"
(at *2)

"In making that discretionary determination, the court should consider relevant factors, such as the extent of the delay, prejudice or lack of prejudice to the opposing party, whether there has been willfulness, and the strong public policy in favor of resolving cases on the merits" (at *2)

FACTUAL BACKGROUND

Wilmington Trust commenced an action to foreclose a consolidated \$740,000 mortgage on real property owned by 134 Eel Pot Alley, LLC. The defendant's attorney failed to calendar the deadline for filing an answer after the defendant's jurisdictional motion was denied, resulting in a four-day delay. The defendant asserted that it had a potentially meritorious defense based on expiration of the statute of limitations, and the record showed no willfulness or prejudice to the plaintiff from the brief delay.

PROCEDURAL HISTORY

Wilmington Trust commenced a mortgage-foreclosure action in 2015. After initially challenging service for lack of personal jurisdiction, 134 Eel Pot Alley, LLC was properly served through its authorized agent on January 29, 2016. Following denial of its renewed jurisdictional motion, the defendant filed an answer four days late and moved for leave to interpose it under CPLR 3012(d), asserting law-office failure and a potentially meritorious statute-of-limitations defense. The Supreme Court denied leave and entered a judgment of foreclosure and sale; the Appellate Division reversed, granted leave to serve the late answer, and denied the motion to confirm the referee's report and for judgment of foreclosure and sale.

DISPOSITION

reversed_and_remanded

REMAND INSTRUCTIONS

The order and judgment of foreclosure and sale was reversed; the defendant was granted leave to interpose a late answer; the plaintiff's motion to confirm the referee's report and for a judgment of foreclosure and sale was denied; and the March 29, 2019 order was modified accordingly.

CASES CITED

- Green Tree Servicing, LLC v. Weiss, 180 A.D.3d 654, 655 (2d Dep't 2020)
- Bank of Am., N.A. v. Viener, 172 A.D.3d 795, 796 (2d Dep't 2019)
- Green Apple Mgt. Corp. v. Aronis, 55 A.D.3d 669, 669 (2d Dep't 2008)
- Lyubomirsky v. Lubov Arulin, PLLC, 125 A.D.3d 614, 614 (2d Dep't 2015)
- King v. Dobriner, 106 A.D.3d 1053, 1054 (2d Dep't 2013)
- People's United Bank v. Latini Tuxedo Mgt., LLC, 95 A.D.3d 1285, 1286 (2d Dep't 2012)
- Montefiore Med. Ctr. v. Hartford Acc. & Indem. Co., 37 A.D.3d 673, 673 (2d Dep't 2007)
- Westchester Med. Ctr. v. Allstate Ins. Co., 80 A.D.3d 695, 697 (2d Dep't 2011)
- Perez v. Travco Ins. Co., 44 A.D.3d 738, 739 (2d Dep't 2007)

OPINION

PER CURIAM.

Wilmington Trust, N.A. v Pape (2021 NY Slip Op 08278) Wilmington Trust, N.A. v Pape 2021 NY Slip Op 08278 Decided on March 17, 2021 Appellate Division, Second Department Published by New York State Law Reporting Bureau pursuant to Judiciary Law § 431. This opinion is uncorrected and subject to revision before publication in the Official Reports. Decided on March 17, 2021 SUPREME COURT OF THE STATE OF NEW YORK Appellate Division, Second Judicial Department MARK C. DILLON, J.P.

SYLVIA O. HINDS-RADIX VALERIE BRATHWAITE NELSON PAUL WOOTEN, JJ. 2019-03717 (Index No. 606468/15) [*1]Wilmington Trust, National Association, etc., respondent, vChristopher Pape, et al, defendants, 134 Eel Pot Alley, LLC, appellant. Zimmerman Law, P.C., Huntington Station, NY (Michael Zimmerman and Naomi Trainer of counsel), for appellant. McCalla Raymer Leibert Pierce, LLC, New York, NY (Jane H. Torcia of counsel), for respondent.

DECISION & ORDER In an action to foreclose a mortgage, the defendant 134 Eel Pot Alley, LLC, appeals from an order and judgment of foreclosure and sale (one paper) of the Supreme Court, Suffolk County (Howard H. Heckman, Jr., J.), entered December 31, 2019.

The order and judgment of foreclosure and sale, upon an order of the same court dated March 29, 2019, inter alia, denying that branch of the motion of the defendant 134 Eel Pot Alley, LLC, which was pursuant to CPLR 3012(d) for leave to interpose a late answer, among other things, granted the plaintiff's motion to confirm a referee's report and for a judgment of foreclosure and sale and directed the sale of the subject property.

ORDERED that the order and judgment of foreclosure and sale is reversed, on the law and in the exercise of discretion, with costs, that branch of the motion of the defendant 134 Eel Pot Alley, LLC, which was pursuant to CPLR 3012(d) for leave to interpose a late answer is granted, the plaintiff's motion to confirm the referee's report and for a judgment of foreclosure and sale is denied, and the order dated March 29, 2019, is modified accordingly.

On June 19, 2015, the plaintiff commenced this action to foreclose a consolidated mortgage in the sum of \$740,000 on certain real property owned by the defendant 134 Eel Pot Alley, LLC (hereinafter the defendant). On July 31, 2015, the plaintiff purportedly effected service upon the defendant by serving the summons and complaint on the Secretary of State. Thereafter, the defendant moved pursuant to CPLR 3211(a)(8) to dismiss the complaint insofar as asserted against it for lack of personal jurisdiction due to allegedly improper service.

On January 29, 2016, the plaintiff re-served the defendant by serving the summons and complaint on the defendant's authorized agent for service of process. In an order dated May 2, 2016, the Supreme Court denied the defendant's motion without prejudice for failure to submit adequate papers, with leave to resubmit.

The defendant then refiled its motion to dismiss the complaint insofar as asserted against it for lack of personal jurisdiction. In an order dated February 1, 2017, the court denied that motion on the ground that service was properly effected on January 29, 2016.

The defendant filed a notice of entry of that order on February 21, 2017. On March 7, 2017, the [*2]defendant filed a verified answer, which was rejected as untimely by the plaintiff. In April 2017, the defendant moved pursuant to CPLR 3012(d) for leave to interpose a late answer and pursuant to CPLR 3211(a)(5) to dismiss the complaint insofar as asserted against it as time-barred.

In support of that motion, the defendant asserted that pursuant to CPLR 3211(f), its time to file an answer was tolled until March 3, 2017, 10 days from the entry of the order dated February 1, 2017, which was entered on February 21, 2017.

In a supporting affidavit, the defendant's attorney averred that the 4-day lapse from the deadline of March 3, 2017, to file an answer resulted from an "oversight" by her due to her failure to calendar the 10-day deadline following the filing of the notice of entry of the order dated February 1, 2017.

In an order dated March 29, 2019, the Supreme Court, among other things, denied that branch of the defendant's motion which was for leave to interpose a late answer. On December 31, 2019, the court entered an order and judgment of foreclosure and sale, inter alia, directing a sale of the subject property.

The defendant appeals. "[A] defendant who has failed to timely answer a complaint and who seeks leave to file a late answer must provide a reasonable excuse for the delay and demonstrate a potentially meritorious defense to the action" (Green Tree Servicing, LLC v Weiss, 180 AD3d 654, 655, quoting Bank of Am., N.A. v Viener, 172 AD3d 795, 796). "The determination as to what constitutes a reasonable excuse lies within the sound discretion of the trial court" (Green Apple Mgt.

Corp. v Aronis, 55 AD3d 669, 669). "In making that discretionary determination, the court should consider relevant factors, such as the extent of the delay, prejudice or lack of prejudice to the opposing party, whether there has been willfulness, and the strong public policy in favor of resolving cases on the merits" (Lyubomirsky v Lubov Arulin, PLLC, 125 AD3d 614, 614).

Here, the Supreme Court improvidently exercised its discretion in rejecting the defendant's proffered excuse of law office failure, since the defendant's attorney set forth a credible explanation for her brief delay of four days in filing the defendant's answer, which resulted from her inadvertent failure to calendar the deadline for such filing (see King v Dobriner, 106 AD3d 1053, 1054; People's United Bank v Latini Tuxedo Mgt., LLC, 95 AD3d 1285, 1286; Montefiore Med.

Ctr. v Hartford Acc. & Indem. Co., 37 AD3d 673, 673). Further, the defendant demonstrated that it had a potentially meritorious defense to the action based upon the expiration of the statute of limitations. Moreover, in light of the strong public policy that actions be resolved on their merits, the defendant's lack of willfulness, and the absence of prejudice to the plaintiff resulting from the brief delay, the court should have granted that branch of the defendant's motion which was for leave to interpose a late answer (see Westchester Med.

Ctr. v Allstate Ins. Co., 80 AD3d 695, 697; Perez v Travco Ins. Co., 44 AD3d 738, 739). The plaintiff's remaining contention is without merit. DILLON, J.P., HINDS-RADIX, BRATHWAITE NELSON and WOOTEN, JJ., concur. ENTER: Aprilanne Agostino Clerk of the Court